DOMESTIC QUESTIONS IN THE LEAGUE OF NATIONS AND THE UNITED NATIONS

BY

CHE-TAI LEE

A.B., National University of Peking, 1941
A.M., University of Illinois, 1947

AN ABSTRACT OF A THESIS

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN POLITICAL SCIENCE
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UNIVERSITY OF ILLINOIS, 1950

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Within its territory, a State exercises jurisdiction or control, which is complete and exclusive in so far as absence of restraint, either contractual or voluntary, is concerned. In other words, each sovereign State may act as it will and may decide any matters within its domain unless some rule of law exists which limits its freedom of action in the circumstances, and it may do so without referene to the wishes or the interests of any other States. This complete and exclusive control over its territory constitutes its internal sovereignty or independence. According as internal sovereignty is carried out through the instrumentality of government, it is called domestic jurisdiction and a question which arises out of such jurisdiction is known as a domestic question.

At this point the connotation of international law as a body of rules governing the conduct of States in international relations requires some explanation. Present international law governs not wholly, but only partially, the conduct of States with reference to their international relations. Many a matter which a State does domestically is bound to affect the interests of other States on account of its external repercussion. However, it does not follow that, simply because it affects the interests of other States, it is brought within the domain of international law. Any matter is considered domestic, not international, concerning which international law permits each State entire freedom of action to the exclusion of any right in any other States to a voice in the decision.

The idea of safeguarding domestic jurisdiction against external interference and impairment has resulted in the common practice in the past of interpreting treaties rather strictly in favor of national sovereignty. Thus, unless there is express language to the contrary, no treaty can be taken to limit by implication the exercise of sovereign rights. This has also

long been familiar as the basis for the distinction between justiciable and non-justiciable disputes. In general terms justiciable questions are considered appropriate to legal modes of settlement. They are such as depend upon issues of law or fact, including the interpretation of treaties or the application of international law, and these, therefore, are peculiarly adapted to decision by a tribunal. All other questions may be loosely classed as non-justiciable which touch not law, but policy and national interests, and such questions do not arise out of any international agreement. In justiciable questions States have admitted that they ought to be settled by impartial external authority and have actually so settled them, while in non-justiciable questions, they have tenaciously maintained the doctrine that the State cannot be sued. They prefer to reserve such matters from the operation of international obligations or the competence of international agencies in respect to these matters and to be the judge of their own obligations.

In view of this, it would seem to be less surprising that there are a number of matters which, though they affect the interest of more States than one, are, nevertheless, outside the scope of international law. So long as international law is developed on the basis of sovereign States, the right of a State to determine its own manner of life and to regulate its own domestic affairs without the consent of others will not be contested. The problem which demands the consideration of the international lawyer is not the existence of such a domain into which international law may not enter, but its extent. Unfortunately, many matters which have been hitherto treated as the domestic concern of the States are of the greatest political implication and can give rise to most serious international friction, but remain outside the domain of international law.

While a reserved domain regarding domestic matters has been common, the content of the term is, however, highly flexible and elastic. Attempts to draw a fixed and immutable list of matters falling exclusively within the domain of domestic jurisdiction of States have proved unsuccessful because

of the divergencies of practice which have resulted from the development of international relations. This does not, however, mean that the matters within the domestic jurisdiction of a State can never be ascertained. The best way to approach this problem is, perhaps, to use the *a contrario* method or the method of elimination. In other words, it can be ascertained in each individual case whether the matter does not come within the domestic jurisdiction of a State. All that is necessary first is to answer the following questions: Does this question, by its very substance and character, belong precisely to those international matters? Or does this question, as a result of the provisions of a treaty, become a matter of international concern? If the answer is "yes," then these are matters which have an international character; they exceed the domain of domestic jurisdiction.[1]

Thus, there seem to be three categories of cases into which the execution of domestic jurisdiction, in so far as its external repercussion is concerned, can be classified: (a) when the execution of domestic jurisdiction violates a universally recognized rule of international law, (b) when it violates rights previously acquired by other States in virtue of a treaty, and (c) when it is detrimental to the interests of other States but without violating a universally recognized rule of international law or any treaty rights previously acquired by other States.

(a) If the execution of domestic jurisdiction violates a universally recognized rule of international law, it constitutes a legal basis on the part of other States to protest. It is well known that international law requires States to abstain from certain conduct and to make reparation for a wrong done. In other words, the jurisdiction of a State is limited legally by the principle of international responsibility. Therefore, a violation of this principle gives rise to an international contro-

(1) On this point Quincy Wright has made an analogy of two different rights in municipal law, i.e., **jus in re propria** and **jus in re aliena.** The former is the right of enjoyment which is incident to full ownership or property, and is often used to denote the full ownership or property itself It is distinguished from **jus in re aliena** which is one limiting or derograting from some other general right belonging to some person in respect of the same subject-matter. See Wright, **Mandates under the League of Nations** (Chicago, 1930), pp. 289-290.

versy and a question primarily domestic shades off into an international question.

(b) If the execution of domestic jurisdiction violates rights previously acquired by other States in virtue of a treaty, it also constitutes a legal basis on the part of other States to protest. This is based on the rule *pacta sunt servanda,* one of the fundamentals of international law. It is obvious that if the fulfillment of treaty obligations can be considered as a domestic matter, the application of such a theory would not only permit the total circumvention of treaty obligations but would destroy the very basis of international law.

(c) The third question, that is, the execution of domestic jurisdiction which is detrimental to the interests of other States but does not violate a universally recognized rule of international law or any treaty rights previously acquired by other States, has been widely argued. According to one school of thought, it is held that even though certain measures taken by a State may be detrimental to the interests of other States, they may not necessarily be contrary to international law. An international tribunal bound to decide on the basis of international law cannot in such a case pronounce against such measures because there exists no rule of law which limits the freedom of the State concerned. They have incurred *damnum sine injuria* which provides no legal basis for complaint and is, therefore, without legal remedy.[2]

This school of thought has been criticized as constituting a serious stumbling block to the development of a system of pacific settlement and as embodying an antiquated idea wholly incompatible with the establishment of an organized international order. For the settlement of disputes it does not suffice

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(2) Charles G. Fenwick has suggested distinguishing two kinds of acts which fall within this category, with a view to assessing the nature of the injury, if any, arising from them, i.e., (1) those causing **damnum sine injuria,** and (2) those falling within the principle **sic utere tuo ut alienum non laedas** of municipal law. The former provides no legal basis for complaint and is without legal remedy, even though causing damage to another State. The latter, on the other hand, in like circumstances, provides liability for compensation. See "The Scope of Domestic Questions in International Law," **American Journal of International Law,** vol. 19 (1925), p. 146.

to appeal to law. Settlement may be satisfactorily obtained through a procedure known as "conciliation," a method of treating disputes between States which experience in the past years has clearly demonstrated may produce constructive results and efficacious solutions. It is, therefore, said that although in the legal process nothing can be done regarding disputes arising out of domestic jurisdiction of a State, some degree of friendly advice or recommendation may be offered by other States, and solutions based upon equity and mutual concession can be successivefully achieved in all aspects of disputes of a domestic nature.

For the purpose of safeguarding domestic jurisdiction of a State, the Covenant of the League of Nations made a limitation on the League's competence with respect to the procedure for pacific settlement. This limitation was to be found in Article 15, paragraph 8, which stipulated that

> If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

This provision was not found in any drafts of a covenant, or in other plans which were submitted to and considered by the Commission on the League of Nations. Nor was it found in the draft Covenant presented by the Commission to the Paris Conference on February 14, 1919. Such an article regarding domestic jurisdiction was proposed later by President Wilson at the suggestions of Senator Hitchcock and former President Taft in order to obviate the fears of many Americans that such matters as immigration and tariffs might, as subjects of dispute, be brought before the Council and the jurisdiction of the United States over them be impaired.[3]

The effect of this provision was that when a dispute was submitted to the Council under Article 15 of the Covenant and

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(3) See David Hunter Miller, **The Drafting of the Covenant** (New York, 1928), vol. I, pp. 276-277, 322, 331, vol. II, p. 677.

it was claimed by one party that the dispute arose out of a matter left exclusively within its domestic jurisdiction by international law, paragraph 8 prevented the Council from making any recommendation upon the subject if the Council found that the contention raised by the party was correct and that the dispute did in fact arise out of a matter exclusively within the State's domestic jurisdiction. The party concerned was thus exempted from the obligation to submit the dispute to pacific settlement as provided by the Covenant. By this provision the right of every State to control, as it saw fit, what was commonly called "domestic jurisdiction" was left wholly unimpaired. However, this principle did not limit the League's freedom of action under Article 11 which enabled the Council, in the event of war or a threat of war, to "take any action that may deem wise and effective to safeguard the peace of nations."

The essential difference between these two methods under Article15 and Article 11 of the Covenant was brought out by Article 5 of the unratified Geneva Protocol of 1924, which enabled the Council to exercise its functions through mediatory or conciliatory measures, through not to make any recommendation for the solution of a dispute concerning domestic questions.[4] Its influence was also found in a number of treaties for pacific settlement, particularly in those concluded in line with the General Act of 1928.[5] It seems also to have led to a provision in the British declaration of September 19, 1929, of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, excepting "disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom."[6]

The British precedent was followed in declarations by the British Dominions (except the Irish Free State), and by

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(4) See Report of the First and Third Committees, League of Nations, **Records of the Fifth Assembly, Plenary Meetings**, annex 30, pp. 479-497.

(5) See Max Habicht, **Post-War Treaties for the Pacific Settlement of International Disputes** (Cambridge, 1931); and United Nations, **Systematic Survey of Treaties for the Pacific Settlement of Disputes, 1928-1948** (1948).

(6) **British Parliamentary Papers**, 1929-30, vol. 32, cmd. 3421.

Yugoslavia, Albania, Rumania, Poland, Iran, Argentina, Brazil, Iraq and Egypt.[7] Thus, if a dispute related to questions which fell within exclusively domestic jurisdiction of one of the parties, it did not fall within one of the four classes enumerated in paragraph 2 of Article 36 of the Statute of the Court. The British reservation was strongly criticized by Professor Lauterpacht as "contrary to the very purpose of the Optional Clause and as such invalidating its signature," and "against the fundamental principle of the Statute of the Court in regard to its right to determine its own jurisdiction."[8]

The meaning of Article 15, paragraph 8, had been clearly defined in the Aaland Islands Dispute, 1920, between Finland and Sweden, and the Tunis and Morocco Nationality Decrees Case, 1923, between Great Britain and France, and had come to be generally understood. In the first case, the Commission of Jurists which was set up by the Council to examine and give an advisory opinion on the question, remarked in the following *obiter dictum*, concerning the application of Article 15, paragraph 8, of the Covenant.[9]

> The Commission ... agreed to reject the notion that the fact that a dispute was brought before the Council by a member of the League of Nations would suffice to invest it with an international character and make it therefore subject to the jurisdiction of the League of Nations, within the meaning and application of paragraph 4 and the following paragraphs of Article 15.
>
> The legal nature of a question cannot be dependent upon the fact that a member of the League of Nations, which may or may not be a party to the dispute, chooses to submit it to the Council. A question is either of an international nature or belongs to the domestic jurisdiction of a State, according to its intrinsic and special characteristics.

Thus, it was clear that simply putting a matter on the agenda of the Council did not suffice to invest the question with an

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(7) P.C.I.J., **Series E, no. 6**, pp. 480-485; **no. 7**, pp. 465-467; **no. 11**, p. 263; **no. 12**, p. 335; **no. 13**, pp. 277-278; **no. 15**, p. 216.

(8) See H. Lauterpacht, "The British Reservations to the Optional Clause," **Economica**, vol. 10 (1930), p. 148ff.

(9) League of Nations, **Official Journal, Special Supplement**, no. 3, p. 4. See also the **Report to the Council by the Commission of Rapporteurs.**

international character, nor did the claim of one that the matter was a domestic one necessarily become the final disposition. The Council had to go on and determine, according to the "intrinsic and special characteristics" of a question, whether or not that claim was well founded.

In the Tunis and Morocco Nationality Decrees Case, the Permanent Court of International Justice defined the term "domestic jurisdiction" in the following opinion:[10]

> The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge.

Further, the Court held that the ambit of domestic jurisdiction of a State varied with the development of international relations, consequently it was purely relative. Even as regards matters included within this jurisdiction, the right of a State to use its unfettered discretion might be restricted by international engagement, and, consequently, Article 15, paragraph 8, did not apply in such Case.[11]

> It may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to sue its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph.

Article 2, paragraph 7, of the Charter reproduced some of the provisions of Article 15, paragragh 8, of the Covenant. The Charter provision regarding domestic jurisdiction reads

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(10) P.C.I.J., Series B, no. 4, pp. 23-24.

(11) Ibid.

as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The origin of this provision of the Charter is found in Chapter VIII, Section A, paragraph 7, of the Dumbarton Oaks Proposals, which was taken almost verbatim from Article 15, paragraph 8, of the Covenant. At the San Francisco Conference, the Sponsoring Governments proposed an amendment which involved revision of paragraph 7 and its transfer to Chapter II (Principles). The only change in the proposal of the Sponsoring Governments was the adoption of an Australian amendment. The main reason was that the Great Powers, being in position to exercise the veto, could in the last resort, avert any encroachment on their sovereignty on the part of the Organization. Since the small nations were not in such privileged position, it was desirable to give them some protection against pressure that might be brought to bear in connection with domestic jurisdiction.[12]

The effect of Article 2, paragraph 7, of the Charter, in the form of the basic principles in accordance with which the United Nations is to act, is not only to release members from the obligation to submit such matters to pacific settlement under the Charter, as was the case under the Covenant, but also to constitute a restriction upon all the functions of the Organization. The exception to the competence of the United Nations was thus given greater prominence in the Charter. The principle contained in this provision does not, however, constitute a limitation on the right of the Security Council to take enforcement measures necessary to preserve peace and prevent aggression. By this provision the Charter recognizes the principle that a State is not subject to control or interfer-

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(12) See U.N.C.I.O., Doc.2, G/7(n)(1); Doc.2, G/7(o); Doc. G/29; Doc.739, I/1/A/19 (a); Doc.914, I/1/A/20; Doc.929, I/1/37; Doc.969, I/1/39; Doc.976, I/1/40; Doc.1019, 1/1/42; Doc.1070, 1/1/34(1)(d).

ence with regard to domestic jurisdiction and its action cannot be called into question by the Organization, although the Charter does not approve the conduct of domestic affairs of a State in such a manner that maintenance of peace and security is endangered.

The most important and far-reaching influence of Article 2, paragraph 7, of the Charter is found in the United States declaration of acceptance of the compulsory jurisdiction of the International Court of Justice. The reservation of the United States removes from the compulsory jurisdiction of the Court:[13]

> ... disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America.

The effect of this reservation is that disputes with respect to matters which are essentially within the domestic jurisdiction of the United States are not only not to come within the compulsory jurisdiction of the Court, but the United States reserves the right to pass unilaterally and finally upon what are matters essentially within its domestic jurisdiction and the mere *ipse dixit* of the United States is sufficient without further explanation to avoid the obligation to accept an appeal to the compulsory jurisdiction of the Court. This reservation was followed by France and Pakistan in their declarations accepting the compulsory jurisdiction of the Court,[14] and has been criticized as constituting a "retrogressive step" in respect to the principle of international adjudication and directly in contradiction to the very concept of compulsory jurisdiction.[15]

Like the Convenant, the Charter does not define the term domestic jurisdiction. A contentious question that may be

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(13) International Court of Justice, **Yearbook, 1946-1947**, pp. 217-218.

(14) **Ibid.**, p. 220; and **ibid., 1947-1948**, pp. 131-132.

(15) Senator Morse referred to it as an unfortunate precedent. Senator Pepper denounced it as a clear violation of Article 36, paragraph 6 of the Court Statute. Professor Lawrence Preuss, writing in the August 11th issue of **The New York Times**, declared that the Senate "smuggled a veto power into our acceptance of the compulsory jurisdiction of the Court." See Francis O. Wilcox, "The United States Accepts Compulsory jurisdiction," **American Journal of International law**, vol. 40 (1946), p. 711.

asked is whether those matters concerning economic, health, culture, education, labor, trade, finance, human rights, colonial affairs, mentioned in Chapters IX, X, and XI, cease to be domestic in scope and in character. In view of the fact that they are mentioned in the Charter, which States, at the time of signing, assumed an obligation to live up to, such matters as ill-treatment of racial or linguistic or religious minorities, selfish exploitation of under-developed countries, unfair preference in matters of trade and customs, misgovernment producing harmful repercussions in other States, and the like, are put within the competence of the United Nations. If these matters are withdrawn from the domain of domestic jurisdiction, the exceptions to the competance of the Organization contained in Article 2, paragraph 7, would be reduced to practically nothing. On the other hand, a contrasting interpretation of Article 2, paragraph 7, implying the establishment of a hard and rigid exception, would prevent all these matters from being considered by the United Nations organs and would reduce the application of those provisions to a less significant degree. Perhaps because of this ambiguous wording of the Charter, the General Assembly and the Security Council have been, in all the instances, reluctant to refer such questions regarding the interpretation of Article 2, parapraph 7, to the International Court of Justice.[16]

It is held that what Article 2, paragraph 7, of the Charter prohibits, is only "intervention" on the part of the Organization in matters that are essentially within the domestic jurisdiction of a State. In international law the word "intervention" means dictatorial interference. Taking this technical meaning for granted, there would seem to be no prohibition against discussion, advice, and recommendation, or other action not involving legally binding force in accordance with Articles 10 and 14 of the Charter. Since such action is not dictatorial interference and involves no coercive power, it cannot be considered as "intervention." It is also proper and

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(16) The most notable cases are the Indonesian Question and Treatment of People of Indian Origin in the Union of South Africa.

right to maintain that such procedures as are mentioned in Chapter VI of the Charter, namely, mediation, good offices, enquiry, conciliation, and other procedures of adjustment not involving force or threats, do not constitute "intervention." All such action is based on persuasion and reasonableness. It provides the machinery for getting the parties to talk matters over with one another, for cooling down their feeling, and for finding a more or less satisfactory way out of the difficulty. The very *raison d'être* of an international organization is to make such machinery and procedure easier, more prompt and more effectual. It would be unreasonable to let any vaguely formulated dogma stultify such action and impair the merits of a plan of this kind.

An opposing interpretation that the Organization is precluded from exercising such functions to settle any problem, however grave, when it is considered to belong to the domestic jurisdiction of the State in question, would mean that the Security Council would have to wait until an actual threat of war arises and then apply enforcement action, including military measures provided in Chapter VII of the Charter, in order to stop the war or prevent the war from breaking out, but not try to settle the underlying dispute by pacific means. Although this was intended by the framers of the Charter,[17] there seems little doubt that this state of affairs is highly unsatisfactory and would be in complete contradiction to the preservation of peace and to the whole system of pacific settlement set up by the Charter.

In contrast with Article 15, paragraph 8, of the Covenant, which had the merit of making it clear that the question whether a matter actually fell within domestic jurisdiction of a State, was to be determined by international law, reference to international law was omitted in Article 2, paragraph 7, of the Charter. This to some extent deprives the concept of domestic jurisdiction of all legal character. The supposed reason for this omission, that international law is too "indefi-

(17) See U.N.C.I.O., Doc.969, I/1/39.

nite" and "inadequate" to be a criterion,[18] has been considered particularly unsound by many writers. It is said that the very term "domestic jurisdiction " is "a term of art in international law," and that the question as to whether a State is under an obligation imposed upon it by international law is to be answered in almost any dispute. "If the 'body of international law' were really so 'indefinite' and 'inadequate' that it would be justified to ignore it, no dispute could be decided in accordance with international law.' "[19] Like all other law, international law is law in development. As the conditions of the international community have changed, the rules which govern the relations of States have changed, and are continually changing their content. To say that international law is "indefinite" and "inadequate" and has no rule for matters of domestic jurisdiction is, therefore, a mistake.

On the other hand, the omission of reference to international law is well-founded and justified. Many questions which seriously affect international relations are, from a legal point of view, domestic. Yet in view of all the serious international implications they are often more political and less legal. Settlement of such questions by reference to international law has indeed the merit of clarifying a legal point. It does not, however, in any true and final sense settle a question in all aspects and facilitate the smooth conduct of international relations since the legal points in such case are often less important than the substantive issues involved. It is right and proper to maintain that a State should be at liberty to determine its own domestic affairs, and that international regulation of such matters and interference from external authority are better excluded. Nevertheless, if a matter assumes international importance to a certain degree, or has caused grave difficulty in relations between nations, it should be taken up by the United Nations, in spite of the fact that it would have been characterized as a matter of

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(18) See U.N.C.I.O., Doc.1019, I/1/42; and **Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation**, pp. 44-45.

(19) Hans Kelsen, "Limitations on the Functions of the United Nations," **Yale Law Journal**, vol. 55 (1946), p. 999.

domestic jurisdiction and therefore constituted a limitation to the competence of the Organization. Simply to clarify a legal point has less practical value in such case. Perhaps it would unduly impede, hinder, or obstruct the action of the United Nations, since it would enable a State to refuse to submit for consideration to the United Nations all the most important questions which might come up within the scope of the Charter. The most hopeful way of maintaining peace and security and the most effectual means of settling a dispute, in many cases, lies in policies which involve a host of necessary resources of flexibility and practicality, and not in "an iron-clad system of obligations in what has been termed 'the rule of law.' "[20]

(20) Shotwell and Salvin, **Lessons on Security and Disarmament** (New York, 1949), p. 1.

VITA

Che-Tai Lee was born on February 26, 1918, in Shanghai, China. After graduating from Futang High School in 1936, he entered the National University of Peking and received the degree of Bachelor of Arts from that institution in July 1941. During the war he had served for two years in the Chinese Army. In July 1942, he was appointed to be assistant in his Alma Mater. Since February 1946, he has been a student in the Political Science Department of the Graduate College of the University of Illinois.